

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)

Extending Wireless)
Telecommunications Services)
To Tribal Lands)

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WT Docket No. 99-266
FCC 00-209

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF TITAN WIRELESS, INC.

Titan Wireless, Inc. ("Titan"), by its attorneys, hereby submits these comments in response to the Report and Order and Further Notice of Proposed Rule Making ("FNPRM") issued in the above-captioned proceeding.¹ Titan supports the Commission's proposal to expand the scope of bidding credits to provide support for all areas with a penetration rate significantly below the national average, including non-tribal lands, and to create a new bidding credit available to companies serving underserved lands.

To be effective, it is imperative that this new credit is earned by all companies providing telecommunications services to underserved lands, no matter whether the company uses satellite or terrestrial wireless technology to deliver the service. Rules favoring one mode of delivery over another would not have any place in the Commission's technologically-neutral market-based policy, and would undermine the goal of serving tribal and other underserved lands with the maximum possible efficiency.² Accordingly, the new credit should become available to

¹ *In the Matter of Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 99-266, Report and Order and Further Notice of Proposed Rulemaking, FCC 00-209 (rel. Jun. 30, 2000), 65 Fed. Reg. 47,366 (Aug. 2, 2000).

² See e.g., Rosston & Steinberg, "Using Market-Based Spectrum Policy to Promote the Public Interest, 50 Fed. Comm. L.J. 87, 99 (Dec. 1997) ("In order for competition to bring
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companies serving tribal lands by Very Small Aperture Terminal (“VSAT”) technology, perhaps in combination with wireless terrestrial systems – the type of service that Titan plans to provide subject to receiving the support needed to make it economic. Furthermore, as the FNPRM appears to recognize, the new credit must be transferable. Any restrictions on assignability would severely chill the incentive of a company to make the significant investment required to serve these areas, since the credit would not “travel” with the company and could therefore be particularly short-lived in today’s fluid telecommunications industry. Conversely, such restrictions are not necessary to ensure continued services by the entity possessing the credit. This goal will have to be achieved by the enforcement and policing mechanisms whether the credit is transferable or not.

Finally, Titan urges the Commission to continue entertaining initiatives that would facilitate service to underserved areas. In particular, Titan’s plans in that respect will be greatly advanced by blanket licensing for C-band dishes. The FNPRM correctly identifies this issue as a relevant one, and the Commission should continue to view service to underserved lands as an important criterion in evaluating requests for blanket C-band VSATs.

I. BACKGROUND

As the Commission is aware from Titan’s prior submission in this proceeding, Titan Wireless has designed and provides a VSAT system that is well suited for service to

consumers the highest valued services in the most efficient manner, we believe competing users of spectrum need flexibility to respond to market forces and demands . . . Flexibility eliminates artificial market entry barriers by enabling spectrum users to respond quickly to changing public demands for new and different services, as well as enabling users to introduce innovative services and technologies rapidly without administrative costs or delays.”).

remote areas, including tribal lands. In addition, Titan provides key components of terrestrial wireless systems that can also be used for economical service to tribal lands. Depending on the particular case, the solutions offered by Titan will consist of an efficient combination of satellite and terrestrial technologies, and will extend to broadband capabilities, including Internet and Worldwide Web access, VSAT Asymmetric Digital Subscriber Lines, and both fixed and mobile service applications.

While Titan believes that its technology is a more cost-effective means of reaching underserved areas than all-terrestrial alternative modes of delivery, the inexorable economics of service to these areas still mean unequivocally that financial support is needed, in the form of both focused universal service funding and regulatory incentives to make the service economic. Titan applauds the auction-specific bidding credit promulgated by the Commission for auction winners committed to serve tribal lands, and recommends extension of the credit to all underserved areas. At the same time, the new credit that the Commission proposes to make available for actual provision of service to such areas can be, if defined appropriately, an even more effective regulatory tool: it would provide an incentive for companies to deploy service to underserved areas by choosing the most efficient possible technology, whether or not it involves an auctioned service.

II. THE COMMISSION SHOULD CONTINUE CONSIDERING MEASURES TO FACILITATE THE PROVISION OF SATELLITE-BASED SERVICES TO UNDERSERVED LANDS

Measures such as blanket licensing of small C-band dishes are extremely important to the success of satellite-based solutions for serving underserved areas. The Commission has repeatedly noted that “satellites are an excellent technology for delivering both

basic and advanced telecommunication services to unserved, rural, insular or economically isolated areas, including Native American communities, Alaska, Hawaii, and Puerto Rico”³ In the FNPRM, the Commission concluded that “existing satellite services may offer a means of providing service to tribal lands.”⁴

Currently, however, VSAT operators must obtain a separate license for each transmit and receive site.⁵ In that connection, the Commission stated that “technical and administrative hurdles to the provision of satellite service to these areas are best considered on a case-by-case basis, and [that it] will entertain waiver requests as necessary to facilitate such deployment.” FNPRM at 19, ¶ 51 (citations omitted). Titan applauds the Commission’s recognition of service to underserved areas as a relevant criterion in evaluating requests for blanket licensing of C-band dishes.⁶

III. THE COMMISSION SHOULD EXPAND ITS BIDDING CREDITS TO ALL UNDERSERVED AREAS

The Commission seeks comment on whether to “extend the bidding credit to areas with penetration levels above 70 percent, and if so, whether it should apply equally to non-tribal as well as to tribal areas.”⁷ The Commission should raise the 70-percent threshold to assist

³ 2 GHz Proceedings at 4886-87, ¶ 95 (1999), *quoted in*, FNPRM at 19, ¶ 50.

⁴ FNPRM at 19, ¶ 51.

⁵ 47 C.F.R. § 25.212(d), *cited in*, FNPRM at 20, ¶ 53.

⁶ See Onsat Petition for Declaratory Order, Waiver and Request for Expedited Action, File No. SAT-PDR-19990910-00091, Public Notice, Report No. SAT-00026 (rel. Sept. 23, 1999).

⁷ FNPRM at 23, ¶ 66.

all areas with a penetration rates significantly below the national average. A 70-percent penetration rate is clearly unacceptable, but by the same token no community should bear the burden of any penetration rate significantly below the national average. Titan, therefore, supports the Commission's proposal and encourages it to develop bidding credits for all areas with penetration rates above 70 percent but significantly below the national average.

The Commission should also expand the bidding credits to unserved and underserved non-tribal areas. Titan applauds the Commission's decision to provide bidding credits to underserved tribal lands. This decision handily withstands constitutional scrutiny because it is primarily based on the *disadvantage* inflicted by low penetration rates in some tribal lands.⁸ "The lack of basic telecommunications services puts affected tribal communities at a tremendous disadvantage."⁹ The inevitable corollary of this disadvantage-based policy is that it should extend to all similarly disadvantaged.¹⁰

With regard to implementation of the proposed bidding credits to non-tribal areas, the Commission asks whether the credits are "likely to affect access to telecommunications

⁸ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 212-13, 227 (2000) (stating that programs based on disadvantage rather than race are subject to relaxed judicial scrutiny, but that race based governmental actions are subject to strict scrutiny; such actions must be "narrowly tailored measures that further compelling governmental interests."). See FNPRM at 9, ¶22 ("We define 'qualifying tribal land' as a federally recognized tribal area that has a telephone penetration rate equal to or less than 70 percent . . .").

⁹ FNPRM at 5, ¶ 9.

¹⁰ At a minimum, if the Commission were to decline to raise the 70 percent threshold for now, the Commission should apply all rules promulgated in this proceeding for all areas, tribal or non-tribal, with penetration rates below 70 percent. Although non-tribal lands with such low penetration may be limited in number, the existence of any area with a penetration rate below 70 percent calls for immediate remediation irrespective of the area's status in the Bureau of Indian Affairs ("BIA").

services in [underserved non-tribal] areas.”¹¹ Meaningful bidding credits administered in conjunction with performance requirements would certainly increase access to telecommunications services in underserved non-tribal areas just as they would in tribal areas. As Titan stated in prior comments, properly allocated bidding credits constitute one of the Commission’s most useful tools for promulgating targeted incentives and affecting behavior by incentive rather than fiat.¹² In accord with Titan’s statements, the Commission concluded that “properly targeted bidding credits will encourage participation in auctions by carriers who are in a position to provide service to tribal lands, and . . . establishing bidding credits for carriers, regardless of size, who agree to extend coverage to tribal areas is in the public interest.”¹³ So long as the Commission can effectively enforce performance requirements, bidding credits will be equally effective in non-tribal areas as they are in tribal areas.

IV. THE COMMISSION SHOULD PROMPTLY ADOPT THE PROPOSED NEW CREDIT

In addition to the auction-specific bidding credit promulgated by the Commission for auction winners committing to serve tribal lands, the FNPRM proposes the creation of a new credit available to companies that have actually deployed service to underserved areas. Titan strongly supports the credit, and believes its amount should be determined based on the same methodology adopted by the Commission for the credit already promulgated in the FNPRM. More specifically, the credit should track that offered by the Commission for service to tribal

¹¹ FNPRM at 23, ¶ 66.

¹² Comments of Titan Wireless (filed Nov. 9, 1999) (“Titan Comments”).

¹³ FNPRM at 7, ¶ 16.

lands: \$300,000 for up to the first 200 square miles of qualifying land, with an additional \$1,500 per additional square mile or \$300,000 for each additional 200 square miles.¹⁴ Any credit cap should also parallel the current rule for tribal lands, which limits the credit available based on the amount of the gross bid at auction, although obviously this would need to be adapted to reference the future auction in which the credit claimant plans to participate.

As to the criterion for determining whether a company has earned the credit, the Commission should use the same performance benchmark it adopted in connection with the other credit – *i.e.*, the licensee must construct and operate its system to cover 75 percent of the relevant population.¹⁵ However, this benchmark must be modified to reflect the particular characteristics of a prospective credit. Specifically, the Commission should require the credit claimant to reach the 75 percent benchmark prior to the relevant auction, and to maintain this level of service post-auction.

At the same time, while the concept of the proposed credit is in principle very attractive, Titan emphasizes that its success depends largely on whether it will be technologically neutral and transferable.

A. The New Credit Should Be Available Regardless of Mode of Delivery

The proposed credit should be technologically neutral so as not to discriminate against satellite service providers.¹⁶ Any different rule would undermine the benefit of letting

¹⁴ *Id.* at 10, ¶ 25.

¹⁵ *Id.* at 13, ¶ 35.

¹⁶ The Commission has repeatedly noted that “satellites are an excellent technology for delivering both basic and advanced telecommunication services to unserved, rural, insular or economically isolated areas, including Native American communities, Alaska, Hawaii, and
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the marketplace identify which mode of delivery is the most efficient way of reaching remote territories, and would also contravene the principle of competitive and technological neutrality that lies at the core of the Commission's relevant policies and statutory mandates: "Congress made clear that the 1996 Act is technologically neutral and designed to ensure competition in all telecommunications markets."¹⁷ Various legislative provisions explicitly reference competitive neutrality,¹⁸ and the Commission has clarified that competitive neutrality encompasses the concept of technological neutrality.¹⁹ Consistent with that policy, the Commission should, whenever possible, allow the efficient and versatile marketplace to determine which technologies or combinations thereof are best suited for providing particular services. The Commission

Puerto Rico"¹⁶ In the FNPRM, the Commission concluded that "existing satellite services may offer a means of providing service to tribal lands."¹⁶

¹⁷ See *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd. 24012, 24013, ¶ 11 (Aug. 7, 1998), cited in, Earl W. Comstock and John W. Butler, *Access Denied: The FCC's Failure to Implement Open Access to Cable as Required by the Communications Act*, 8 CommLaw Conspectus 5, n.26 (Winter, 2000).

¹⁸ See e.g., 47 U.S.C. §153(46) (defining telecommunications service as "the offering of telecommunications for a fee . . . regardless of the facilities used."); 47 U.S.C. § 254 (b)(4), (d), (f) (mandating competitive neutrality in the universal service context); 47 U.S.C. § 253 (b), (c) (mandating competitive neutrality in state and local actions). The Commission's Rules specifically reference *technological* neutrality. 47 C.F.R. § 76.1002 (addressing competitive access to multichannel video and cable television service).

¹⁹ See *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd. 87,101-02 ¶ 23 (1997) ("[T]he principle of competitive neutrality encompasses the concept of technological neutrality by allowing the marketplace to direct the development and growth of technological and avoiding endorsement of potentially obsolete services."); *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776, 8801, ¶ 47(1997), as corrected by Errata, CC Docket No. 96-45 (rel. June 4, 1997) (In the Universal Service context, competitive neutrality means that rules should "neither unfairly favor nor disfavor one technology over another."). See generally, Rosston & Steinberg, "Using Market-Based Spectrum Policy to Promote the Public Interest, 50 Fed. Comm. L.J. 87 (Dec. 1997).

should, therefore, confirm that the new credit is available to companies deploying satellite-based or hybrid services and can be used in any future wireless auction, regardless of the nature of the particular service being auctioned. Conversely, a rule where a credit is available only for auctions for the same type of service that the company is already offering would essentially preclude most satellite companies from earning the credit, and would discourage satellite-based solutions regardless of their efficiency.

B. Bidding Credits Should Be Transferable

The Commission seeks comment on making bidding credits “transferable to third parties for use in future auctions.”²⁰ Titan supports the Commission’s proposal and agrees with its observation that the provision of service to tribal lands and other underserved areas would not be devalued by the transfer of bidding credits.²¹ Indeed, transferability would entice more companies to provide service in unprofitable underserved areas.

Credits encourage a company’s initial decision to provide service to unprofitable areas such as tribal lands, but only enforcement of performance criteria affect the company’s decision to continue provision of service. The Commission’s goal, in essence, is to entice service providers to subject themselves to the Commission’s performance criteria and enforcement regime. Since transferability would “heighten the attractiveness of such credits,” more service providers would be willing to subject themselves to the Commission’s performance criteria and thereby provide service to unprofitable underserved areas. The Commission would

²⁰ *Id.* at 24, ¶ 70.

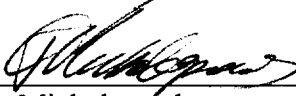
²¹ *Id.*

increase the value of the credits to the service providers without increasing the credits themselves. At no extra cost to the Commission or the American people, therefore, the Commission can increase the penetration rates in underserved areas. As to the goal of ensuring continuation of service, it depends on the effectiveness of the Commission's policing mechanisms whether the credit is transferable or not. Making credits transferable in this context would thus have only upside and now downside potential; it would utilize wise economics to lower the cost of increasing incentives for providing service in unprofitable underserved areas.

V. CONCLUSION

For the foregoing reasons, Titan respectfully urges the Commission to extend all of the regulatory incentives promulgated in this proceeding to all areas, including non-tribal lands, with penetration rates significantly below the national average. The Commission should also adopt the new proposed bidding credit, and make it technologically neutral and transferable.

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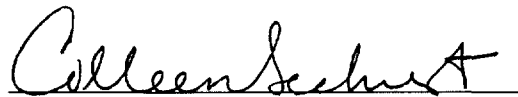
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CERTIFICATE OF SERVICE

I, Colleen Sechrest, hereby declare that a copy of the foregoing Comments of Titan Wireless was sent this 1st day of September 2000 by messenger to the following:

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